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In the Supreme Court of the United States

OCTOBER TERM, 1946.

JOHN P. McWILLIAMS,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
No. 945.

ESTATE OF SUSAN P. McWILLIAMS,
deceased,
JOHN P. McWILLIAMS, Executor,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
No. 946.

BROOKS B. McWILLIAMS,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
No. 947.

BRIEF OF PETITIONERS.

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OPINIONS BELOW.

The opinion of the Tax Court of the United States is reported at 5 T. C. 73. It is printed at pages 11 to 16 of the record. The opinion of the Circuit Court of Appeals is reported at 158 Fed. 2d 637, and it is printed at pages 101 to 106 of the record.

JURISDICTION OF THE COURT.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938; U. S. C., Title 28, Section 347a) and Section 1141 of the Internal Revenue Code (53 Stat. 154; U. S. C., Title 26, Section 1141).

STATUTE INVOLVED.

The statute involved is Section 24(b)(1)(A) of the Internal Revenue Code, the relevant parts of which read as follows:

"Sec. 24. ITEMS NOT DEDUCTIBLE:

* * * * *

(b) *Losses from sales or exchange of property*—

(1) *Losses Disallowed*:—In computing net income no deduction shall in any case be allowed in respect of losses from sales or exchanges of property directly or indirectly—

(A) Between members of a family as defined in paragraph (2) (D);

* * * * *

(2) * * *

(D) The family of an individual shall include only his brothers and sisters (whether by the whole or half blood) spouse, ancestors and lineal descendants; * * *"

STATEMENT OF THE MATTER INVOLVED.

John P. McWilliams, petitioner in Case No. 945, is the husband of Brooks B. McWilliams, petitioner in Case No. 947. Susan P. McWilliams, whose estate is petitioner in Case No. 946, was the mother of John P. McWilliams. In several transactions during the years 1940 and 1941, one petitioner sold, on the New York Stock Exchange, a certain number of shares of a stock listed on the New York Stock Exchange. The buyer of the stock was unknown to petitioner. Thereafter, another petitioner purchased, on the New York Stock Exchange, a like number of shares of the same stock, from persons unknown. (R. 13-14.) These transactions were conducted as follows: Petitioner John P. McWilliams gave his broker an order to sell for his or

his wife's or his mother's account, a certain number of shares of a particular stock at the market, and to thereafter purchase at as nearly the same price as possible a like number of shares for the account of one of the others. No restrictions were placed on the orders—the securities were to be sold regardless of whether another petitioner could thereafter purchase similar securities at similar prices. One petitioner did not sell in order to enable another to buy. The broker was told that the sale was for the purpose of establishing a tax loss. (R. 80, 85, 12-14.)

Petitioner John P. McWilliams had for many years managed the separate property of his wife and mother, whose securities have always stood in their own names and been kept separate from his. Each petitioner has maintained a separate bank account and has filed separate income tax returns. During the years involved, each petitioner owned property greatly in excess of the amounts involved in these transactions. (R. 12-14.)

The foregoing sales resulted in losses to the selling petitioners which they claimed as deductions for income tax purposes. The respondent disallowed the losses and determined income tax deficiencies, claiming that the sales were indirect sales between members of a family within the provisions of Section 24(b)(1)(A) of the Internal Revenue Code. The Tax Court found that the sales were bona fide and that the resulting losses were deductible, and entered judgment of no deficiencies. Upon appeal by respondent, the Circuit Court of Appeals for the Sixth Circuit reversed the Tax Court (one judge dissenting). Petitioners on January 24, 1947 filed in this Court a Petition for Writs of Certiorari to review the decision of the Circuit Court of Appeals. Said Petition was granted by this Court on March 3, 1947.

ASSIGNMENT OF ERRORS.

The Circuit Court of Appeals erred in the following particulars:

1. In reversing a factual finding of the Tax Court supported by substantial evidence, contrary to the decision of this Court in *Dobson v. Commissioner*, 320 U. S. 489, and succeeding cases decided by this Court.
2. In determining that the sales by petitioners were indirect sales between members of a family within the meaning of Section 24(b)(1)(A) of the Internal Revenue Code, and in failing to allow petitioners deductions for long term capital losses which they sustained and which deductions were allowed by the Tax Court.

ARGUMENT.

I.

The Circuit Court erred in reversing a factual finding of the Tax Court supported by substantial evidence, contrary to the rule first laid down by this Court in the Dobson case, 320 U. S. 489.

The Tax Court in the instant cases found that the sales by petitioners were not indirect sales between members of a family. This finding of fact is not subject to review by the Circuit Court of Appeals under the rule laid down by this Court in the *Dobson* case, because it has "warrant in the record and a reasonable basis in the law" and because "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by" the Tax Court. *Dobson v. Commissioner*, 320 U. S. 489.

There was, in the instant cases, much more than merely "warrant in the record and a reasonable basis in the law" for the findings of the Tax Court. Nothing passed *between*

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* Emphasis throughout ours except where otherwise noted.

any of the petitioners—those who sold, sold to persons unknown to them and those who bought, bought different share certificates from persons unknown to them (R. 13); each buying petitioner used his own separately maintained funds (R. 13-14); no restrictions were placed on the sales—they were to be carried out regardless of whether another petitioner could purchase similar securities at similar prices. (R. 80-85.) Any Tax Court finding so well supported by evidence cannot be reviewed by the Circuit Court of Appeals. Yet in the instant cases the Circuit Court of Appeals, in complete disregard of the *Dobson* rule, treated the findings of the Tax Court as naked questions of law and decided that under the particular facts, indirect sales took place—thereby substituting its own views of a factual matter for those of the Tax Court. In so doing it exceeded its jurisdictional powers. For it is apparent that the determination of whether a transaction is an indirect sale is entirely a factual matter, to be decided by the Tax Court. Every such transaction presents a different set of facts and even those transactions which apparently are very similar are factually different in many respects. Innumerable combinations of facts may arise which the respondent might claim to be indirect sales. Here are only a few:

Suppose that by prearrangement, a husband sold listed securities to persons unknown through the New York Stock Exchange and thereafter his wife, with her own funds, bought similar securities, her husband acting as her agent in the transaction. Suppose the interval between this sale and purchase was (a) one hour; or (b) one day; or (c) two days; or (d) fifteen days; or (e) twenty nine days; or (f) thirty one days; or (g) six months. Or suppose (h) that the wife bought immediately *before* the husband sold, or (i) one day before; or (j) ten days before; or (k) twenty nine days before; or (l) thirty one days before. Or suppose that in each of the above instances the wife acted for herself rather than through her husband as agent; or sup-

pose that in each instance the husband and wife used separate brokers.

Or suppose that each of the foregoing transactions took place by coincidence, the wife, whether she handled her own affairs, or had them managed by a third person, being completely unaware of what her husband did. Or suppose that in some of these transactions the husband advanced money so that his wife could purchase, and in others she used her own funds.

Can it be accurately said that the determination of whether each of the foregoing transactions is an indirect sale is a pure question of law? Can a rule of law be formulated which will fairly cover each of these transactions? Or is it not obvious that each transaction presents a separate set of facts, and that the Tax Court must determine from those particular facts whether an indirect sale has taken place—with the decision of the Tax Court in each case a finding of fact which cannot be reviewed by the Circuit Court of Appeals? *Dobson v. Commissioner, supra*; *Commissioner v. Scottish American Co.*, 323 U. S. 119; *Boehm v. Commissioner*, 326 U. S. 287; *Commissioner v. Flowers*, 326 U. S. 465; *John Kelley Co., et al. v. Commissioner*, 326 U. S. 521.

The factual nature of the matter is clearly illustrated by the virtual certainty that if in the instant cases the lapse of time between sale and purchase had been six months, no court would say that an indirect sale had taken place. Can it be said as a matter of law that no indirect sale has taken place if there is a lapse of six months between sale and purchase, but that if the interval is shorter, then there has been an indirect sale? Or is it not apparent that all the facts including the time element must be weighed by the Tax Court to determine the ultimate fact of whether there has been an indirect sale?

Any attempt to formulate an all embracing rule of law to cover every situation where an indirect sale might be

claimed to have taken place will result only in confusion. A decision attempting to do so would be applicable only to the particular facts before the court—the remainder of the decision would of necessity be dictum. This would result in a state of confusion both for taxpayers and the Treasury Department. The correct and most practical solution is to leave the determination of whether an indirect sale has taken place to the body best qualified to weigh the particular facts—the Tax Court. The Tax Court should have the sole responsibility of determining these factual questions until such time as Congress sees fit to change the law and set up detailed, prescribed requirements for the determination of what is an indirect sale. This Court, speaking of the function of the Tax Court in *Dobson v. Commissioner, supra,* said at page 501:

> "Congress has invested the Tax Court with primary authority for redetermining deficiencies, which constitutes the greater part of tax litigation. This requires it to consider both law and facts. Whatever latitude exists in resolving questions such as those of paper accounting, treating a series of transactions as one for tax purposes, *or treating apparently separate ones as single in their tax consequences, exists in the Tax Court and not in the regular courts.*"

Respondent contends that the instant cases involve "pure questions of law or statutory constructions" and that thus the rule of the *Dobson* case is not applicable to them. These contentions have already been answered by this Court. The finding of the Tax Court in the instant cases that the facts did not constitute an indirect sale is no more a "pure question of law" than was the finding of the Tax Court that stock did not become worthless in a particular year. *Boehm v. Commissioner, supra.* In that case this Court stated at page 293:

> "But the question of whether particular corporate stock did or did not become worthless during a given taxable year is purely a question of fact to be deter-

mined in the first instance by the Tax Court, the basic fact-finding and inference making body. The circumstance that the facts in a particular case may be stipulated or undisputed does not make this issue any less factual in nature. The Tax Court is entitled to draw whatever inferences and conclusions it deems reasonable from such facts and an appellate court is limited, under familiar doctrines, to a consideration of whether the decision of the Tax Court is 'in accordance with law.' 26 U. S. C. Sec. 1141 (c)(1). If it is in accordance, *it is immaterial that different inferences and conclusions might fairly be drawn from the undisputed facts.*"

And this Court has held that the question of statutory application is a factual question to be determined by the Tax Court in the light of the particular circumstances. *John Kelley Co. et al. v. Commissioner, supra.* In that case this Court discussed the phrase "the proper interpretation and application of the statute or any regulation having the force of law," which was cited as an example of a question of law in the Committee Report accompanying the 1926 Act which permits review of Tax Court decisions "not in accordance with law." At page 529:

"The illustrations in the report, note 7, *supra*, are legal questions without doubt, except the possibility that the words 'application of the statute or any regulation having the effect of law' may be thought to give a reviewing court power to pass upon the Tax Court's conclusion from the primary or evidentiary facts. So that in the present cases, it might be said to be a question of law as to whether the primary facts adduced made the payments under consideration dividends or interest. But we think such conclusion gives inadequate weight to the purpose of the Tax Court. The finality of the Tax Court's rulings was being enlarged by the 1926 Act. The then Board was spoken of as an impartial and independent tribunal of experts 'for the determination of tax liabilities as between the Government and the taxpayer.' H. Rep. No. 1, 69th Cong., 1st Sess., p. 17. There would hardly need to be experts in tax affairs to decide questions of dates or amounts

or values or to calculate rates. *Their usefulness lies primarily in their ability to examine relevant facts of business to determine whether or not they come under statutory language.*"

The decision of the Tax Court in the instant cases is not subject to review, since the conclusions of the Tax Court are findings of fact, they are based on substantial evidence, and they present no "clear cut mistake of law." *Dobson v. Commissioner, supra.*

The decision of the Circuit Court of Appeals should be reversed and the judgment of the Tax Court should be sustained.

II.

The sales by the petitioners were not direct or indirect sales between members of a family within the meaning of Section 24(b)(1)(A) of the Internal Revenue Code.

(a) The sales did not come within the letter of the statute.

The statute in question, Section 24(b)(1)(A) of the Internal Revenue Code, reads in part as follows:

"SEC. 24. ITEMS NOT DEDUCTIBLE:

* * * * * *

(b) *Losses from sales or exchange of property*—

(1) *Losses Disallowed.*—In computing net income no deduction shall in any case be allowed in respect of losses from sales or exchanges of property, directly or indirectly—

(A) Between members of a family as defined in paragraph (2)(D);

* * * * *

(2) * * *

(D) The family of an individual shall include only his brothers and sisters (whether by the whole or half blood) spouse, ancestors and lineal descendants; * * *"

The statute prohibits the deduction of losses only on those sales which are *between* members of a family. From the facts as found by the Tax Court, it is clear that there was no sale, directly or indirectly, *between* any of the petitioners. The sales in the instant cases were executed on the New York Stock Exchange, through which one petitioner sold his securities to persons unknown, and through which another petitioner purchased from persons unknown similar securities, but securities having a different identity. The sales were bona fide, a matter of public record, selling petitioner completely divested himself of his securities. Quite possibly the selling petitioner sold to a resident of California, and the buying petitioner bought from a resident of Massachusetts. By no stretch of the imagination can it be said that one petitioner sold his securities to another petitioner—nothing passed *between* them and hence there was no indirect sale within the provisions of the statute. If, on the other hand, one petitioner had sold his stock to a third person acting as a "dummy," and that person later sold the identical stock to petitioner's wife, familiar principles of agency would constitute these transactions an indirect sale within the statutory provisions. But under the facts in the instant cases, nothing passed *between* any of the petitioners and therefore there was no indirect sale between members of a family within the provisions of Section 24(b)(1)(A).

The courts recognized that the statute covers only sales *between* members of a family in the case of *Pauline Ickelheimer*, 45 B. T. A. 478 (1941), affirmed, *Commissioner vs. Ickelheimer*, 132 Fed. 2d 660 (1943), C. C. A. 2. That case, in which the statute was first considered by the courts, involved a determination of the application of 24(b)(F), with respect to a sale indirectly between the fiduciary of a trust and the beneficiary of such trust. The petitioner sold bonds on the market over a ten day period and the trustee purchased with trust funds during this period an equivalent

amount of the same bonds for the trust. The orders to sell were given to brokers and were executed by that firm on the New York Stock Exchange in the regular manner. The bonds purchased by the trustee were purchased through a broker and the orders for purchase of the bonds were executed by that firm on the New York Stock Exchange. Of the total of 100 bonds purchased by the trustee, four bonds bore the same serial numbers as those sold by the petitioner, and the remaining 96 bonds bore different serial numbers.

The Board of Tax Appeals held that, since the sales were made on the New York Stock Exchange to persons unknown, nothing passed "between" petitioner and the trust, and that there was no indirect sale between them. The opinion states at page 481:

> "It is patent that the sale of bonds by petitioner was not a direct sale of bonds to her husband as trustee of the trust. The bonds were sold through a broker to undisclosed purchasers. Petitioner's husband as trustee purchased similar bonds from undisclosed vendors."
>
> * * * * *
>
> "We are of the opinion that the facts herein do not disclose an indirect sale from petitioner to her husband as fiduciary of the trust. It is apparent that the sales of the bonds were made to purchasers other than the trustee of the trust. The fact that petitioner's husband as trustee purchased the bonds from the open market shortly thereafter does not convert the sales by petitioner and the purchases by her husband as trustee into indirect sales *between* petitioner and her husband as trustee."

The Circuit Court of Appeals for the Second Circuit also recognized this requirement. At page 661:

> "The sales completely divested the taxpayer of any interest in the bonds and passed title thereto to unknown purchasers. There was no agreement between her and her husband or between the husband and the undisclosed purchasers from her that the trust could

buy what she sold *or that she should sell to enable the trust to buy.* Indeed, it is apparent that the trust could have purchased 96 of the 100 bonds bought for it even if she had not sold, and as to the 4 bonds which she had formerly owned it was mere accident that the trust later acquired them rather than others.

* * * * *

"It is clear that the transactions do not fall within the letter of the statute."

From the foregoing, it is clear that there can be no indirect sale within the meaning of the statute unless property passes *between* members of a family. And in the instant cases nothing passed *between* any of the petitioners.

(b) The sales did not come within the intent of the statute.

The statute in question was first enacted as a part of the Revenue Act of 1934. The 73rd Congress, which drafted the statute, was concerned with stopping various methods of tax avoidance. Among them was the practice of a husband "selling" securities to a member of his family directly, or through the medium of a third person acting as a "dummy."

In this type of transaction there is no real evidence to show that the husband has actually disposed of his securities or that he cannot get them back whenever he wishes; the identical securities are passed to another member of a family; the transactions are a matter of private record only. These transactions have been labeled "boudoir sales."

And that is the type of transaction which Congress was aiming at in passing Section 24(b)(1)(A). They had no intention of outlawing bona fide sales at market price to persons unknown through a public exchange, when after such sales a family member bought at market price securities represented by different certificates from persons unknown. When one member of a family has disposed

of his securities to persons unknown in a bona fide sale which is publicly recorded, it matters not that another member of the family thereafter purchases similar but different securities with her own funds. Husband and wife are separate legal entities, and have always been treated as such for tax purposes.

It is apparent that Congress in enacting Section 24(b)-(1)(A) had no intention of embracing bona fide sales on public exchanges. The Second Circuit Court of Appeals held in *Commissioner vs. Ickelheimer, supra*, that Congress did not so intend. At page 661:

> "It is clear that the transactions do not fall within the letter of the statute.
>
> Nor do we think they were such as the purpose of the statute sought to embrace. The purpose was to disallow losses incurred in transactions which were not 'definitely at arms length.' See 81 Cong. Rec. 9019. Sales between members of a family were often not real transactions but it was not easy for the Commissioner to prove them sham. Indirect sales through a friend or dummy were also not uncommon. The restriction on losses first introduced in section 24 of the 1934 Act was intended to meet these evidentiary difficulties. See 78 Cong. Rec. 2662. Congress did not express, and we see no reason to suppose that it entertained, any intention to disallow losses realized by bona fide sales on a public exchange. Under prior revenue acts such a sale entitled the seller to a deduction despite a contemporaneous purchase on the exchange of similar securities by a member of the seller's family. *Commissioner v. Behan*, 2 Cir. 99 F. 2d 609. His purchase does not make the prior sale one indirectly between the parties. Had Congress intended to strike down losses realized by a bona fide sale executed on a public exchange in case a member of the seller's family should purchase similar securities shortly thereafter, we think language more apt for the purpose would have been employed."

In an article dealing with this Section in 49 *Yale Law Journal* 82 (note 46) the following observation is made:

(The article first points out that Congress obviously intended that capital losses for purposes of income tax deductions should be realized only on bona fide sales and after setting forth the history of section 24(b) the comment is made that a loss-resulting sale may not be disallowed merely because the tax reduction motive was predominant.)

"Thus a sale is final if the shareholder risks his holdings in the open market. *Samuel M. Vauclain*, 16 B. T. A. 1005 (1920). In that case (prior to enactment of Sec. 118) stock was repurchased on the same day.

"Where husband sells securities on the market and wife immediately buys similar securities with her own money, it is probably neither a wash sale under sec. 118 nor an indirect sale under sec. 24(b). *Commissioner v. Behan*, 90 F. 2d 609; but if Congressional policy discourages immediate repurchase by the taxpayer, should he be permitted to achieve nearly the same benefits through immediate repurchase by one in close relation to him? *Section 118 might well be combined with 24(b) and expanded to disallow loss where, within 30 days, there has been a purchase by persons in the relations there described.*"

From the above article, it is seen that as early as 1939 suggestions have been made that if Congress really wanted to make a capital loss arising out of the sale of securities non-deductible in the event that a member of the same family purchased substantially the same securities, they should amend the law to say so. It is submitted that the fact that Congress has not taken any such action in the intervening years since 1941 when the Tax Court decided the *Ickelheimer* case, is a strong indication that they do not desire to do so.

In *Mertens Law of Federal Income Taxation*, Vol. 1, Sec. 3.22, the following statement is made:

"3.22 Administrative or Judicial Construction Followed by Statutory Re-enactment. In an earlier section we dealt with a fundamental canon of construction to the effect that Congress is presumed to use

terms in a statute in their ordinary and settled meaning. A corollary of this rule is that when Congress re-enacts a statute it is presumed to have knowledge of Treasury Department regulations, court decisions and Treasury Department practice which are factors in fixing the everyday and trade meaning of terms, and accordingly it is presumed to have used the terms in that sense. In line with this reasoning, there is a great body of cases holding that the re-enactment of a statute substantially unchanged is persuasive indication of the adoption by Congress of a prior judicial construction thereof. Likewise, where an executive construction of a statute is followed by Congressional re-enactment without change, a *rebuttable presumption* is created that Congress approved such construction of the statute. The ruling or regulation then is said, where this presumption is not rebutted, to have the force and effect of law."

(The text cites many authorities supporting the above rather fundamental statement of the law.)

If an indirect sale between members of a family as encompassed in Section 24(b) should be held to include the sale through the medium of a stock exchange in the usual manner by the taxpayer to persons unknown and the purchase of substantially the same securities by a member of the taxpayer's family through the same medium from sellers unknown, there will then arise a strange inconsistency between Section 24(b) and Section 118.

Section 118 provides clearly by implication that a taxpayer may sell securities and repurchase them after thirty days have elapsed and be entitled to a tax loss on the original sale. Section 24(b) on the other hand contains no time limitation. For instance, in the instant case in which John P. McWilliams is the petitioner, he sold certain securities on July 3rd. Let us suppose that his wife, instead of purchasing substantially the same securities on July 3rd, had waited until August 5th, more than thirty days, before purchasing the securities.

Assuming only for the purposes of argument that Congress intended to cover by the term "indirect sale" such separate transactions by husband and wife, it is clear that Congress failed in Section 24(b) to set a time limit as it did in Section 118 beyond which such transactions would not be considered "indirect sales." The fact that Congress did set such a time limit in Section 118 and failed to do so in Section 24(b), thus leaving in the latter case the door wide open for the Commissioner to claim an "indirect sale" in the example posed above, indicates that Congress did not intend to encompass within the term of "indirect sale" the transactions involved in the instant cases. It is certainly a fair assumption that had Congress intended to encompass such transactions by the term "indirect sale," following the requirements of explicit draftsmanship, it should and would have covered the time element as it did in Section 118. It is somewhat absurd to assume that Congress intended that the purchase of substantially the same securities by a wife 30 days after a sale by the husband would invalidate his tax loss when Section 118 provides that a similar purchase by the husband 30 days after such sale would not invalidate the tax loss.

Another argument that shows that Congress did not intend an "indirect sale" to cover the transactions here involved is the fact that Section 118 was originally enacted in June of 1924 and has remained in substantially the same form since the Act of 1928. In that Act and in all subsequent re-enactments of this section, the language used is—

> "In the case of any loss claimed * * * where it appears that within thirty days before or after the date of such sale, taxpayer has acquired * * * *substantially* identical property * * *."

This phrase—"substantially identical property" was well known to Congress and had received the judicial interpretation of the courts prior to the enactment of Section

24(b) in 1934; and yet Congress did not use this language in drafting Section 24(b) but dealt only with sales *between* members of the same family, etc. Having before it the language of Section 118 and the judicial interpretations and regulations, Congress must have had a reason for using new and entirely different language in dealing with transactions between members of the same family, etc.

It is apparent that in enacting Section 24(b)(1)(A) Congress had in mind primarily "boudoir sales" between husband and wife, etc., and that it did not want to go to the length of saying that another member of the same family might not purchase substantially the same securities sold by the taxpayer claiming the deduction, but that it did intend to prevent the establishment of tax losses through informal sales within a family. The two things are, of course, entirely different. The evidence with respect to "boudoir sales" is so solely within the control of the members of the family that as long as they could be used to establish tax losses there was a real invitation to fraud. Such sales can readily be antedated,—in the face of which the government is usually helpless. However, in the instant cases, the evidence and records of the brokers, the sale and purchase of securities on the stock exchange, and the detail of the sales clearly establish that the sales were made and the losses incurred by the taxpayers at the times claimed by the respondents; and under such conditions Congress did not desire that the resultant tax losses should be disallowed. Certainly the ordinary meaning of 24(b) does not include such sales. As said by the Circuit Court of Appeals in the *Ickelheimer* case, *supra*,—

> "Had Congress intended to strike down losses realized by a bona fide sale executed on a public exchange in case a member of the seller's family should purchase similar securities shortly thereafter, *we think that language more apt for the purpose would have been employed.*"

The Circuit Court of Appeals in its opinion in the instant cases placed great emphasis on the fact that after the transactions were completed, similar securities were still held within the "family group," and that thus no material change was made in each of petitioner's property rights. This reasoning has no basis unless the incomes and property of various members of a family group must be treated as a single unit for tax purposes. And it has been very definitely settled by Congress that such a requirement is not a part of our law. It has been many times proposed that Congress require husbands and wives to file joint income tax returns, thereby creating a compulsory family unit. Recently, the proposal was revived in 1941 and 1942. In August, 1941 it was overwhelmingly defeated in the House of Representatives and it was rejected in committee in the Senate, despite support by the Treasury Department. The following year the Treasury again strongly urged passage of such a measure; it was rejected in committee by both houses of Congress. Obviously Congress looks upon such a measure with disfavor but unless this "family unit" theory is followed there is no basis for the decision of the Circuit Court of Appeals. The instant cases present in substance the following situation:

One petitioner sold property to X—a person unknown to him; his wife thereafter purchased similar property from Y—a person unknown to her. Nothing passed "between" husband and wife, directly or indirectly. After the transactions were completed, the wife owned *different* property from that formerly owned by the husband. The fact that Y's property, now owned by the wife, is similar to property owned by X, formerly owned by the husband, is no support to the conclusion that the husband sold his property to the wife. That conclusion can be reached only by adopting the theory that the husband and wife constituted a "family unit"—that the income and the property of each are not separate but must be treated together for

tax purposes. That is not the law now, nor has it ever been.

The decision of the Circuit Court of Appeals should be reversed, and the decision of the Tax Court should be affirmed.

Respectfully submitted,

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